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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-47

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

v.

EDWIN BAKER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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To: *The Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States.*

The People of the State of New York petition this Court and respectfully pray that a writ of *certiorari* issue to review an order of the Court of Appeals of the State of New York entered June 17, 1976, which reversed an order of the Appellate Division, Second Judicial Department, entered May 5, 1975, which in turn, had reversed, upon the People's appeal, an order of the Supreme Court, Kings County, entered November 14, 1974, dismissing the indictment herein upon a trial order of dismissal. The Court of Appeals remitted the case to the Appellate Division with directions that the original appeal to that Court be dismissed.

Opinions Below

The opinion of the Court of Appeals is included in Appendix A and is not yet officially reported. The opinion of the Appellate Division, Second Department, is included in Appendix C and is reported in 48 A.D. 2d 662; 367 N.Y.S. 2d 534.

Jurisdiction

The order of the New York Court of Appeals was entered on June 17, 1976. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Question Presented

Whether a trial order of dismissal which was issued pursuant to New York Criminal Procedure Law § 290.10 (McKinney 1971), upon a determination that the evidence was not legally sufficient to establish the offense charged or any lesser included offense, is properly appealable by the prosecution, without being in violation of the right of an accused not to be twice placed in jeopardy.

Constitutional Provisions Involved

United States Constitution Amendments V and XIV.

Statement of the Case

Prior to Respondent's trial for Murder (New York Penal Law § 125.25 [McKinney 1967])* and other offenses

* Since re-designated as Murder in the Second Degree.

under Kings County Indictment No. 3204/1971, and in anticipation that one Rufus Boyd, the only available prosecution witness, would upon cross-examination, assert his privilege against self-incrimination regarding the facts underlying several indictments outstanding against him, the judge entertained pre-trial arguments concerning the consequences envisioned. At the conclusion of arguments, the trial court determined that a protective order restricting the scope of cross-examination was not warranted and indicated that in the event that the witness did so refuse to answer, his direct testimony would be striken. Respondent then waived his right to a jury trial and the case proceeded.

Subsequent to Boyd's actual invoking of his Fifth Amendment privilege in the course of such cross-examination, the respondent's motion to strike his direct testimony was granted. Furthermore, since the People had indicated that no other witnesses were available, the court also granted a motion for a trial order of dismissal of the indictment, on the ground that the remaining evidence was legally insufficient.

Thereafter, pursuant to the People's appeal, the Appellate Division, Second Department, reinstated the indictment determining that the direct testimony was improvidently striken, the contested cross-examination having been merely collateral to the specific issues then at bar. Upon the Respondent's further appeal to the Court of Appeals, however, that Court (simultaneously considering other cases also involving appeals from such trial orders of dismissal) reversed the order of the Appellate Division, holding the original appeal unconstitutional, and remitted the case thereto, with directions that it be dismissed.

Reasons for Allowance of the Writ

This case, which involves an interpretation by the New York Court of Appeals of this Court's recent holdings in the "Double Jeopardy" trilogy of *United States* v. *Jenkins*, 420 U.S. 358 (1975); *United States* v. *Wilson*, 420 U.S. 332 (1975); and *Serfass* v. *United States*, 420 U.S. 377 (1975), presents a heretofore unconsidered and substantial question of constitutional dimension, which merits review upon this petition.

In its ruling, the highest court of New York (writing in the companion case of *People* v. *King Brown*, decided herewith—see Appendix B) held that since N.Y. Criminal Procedure Law § 450.20(2) (McKinney 1971), which allows prosecutorial appeals from "Trial Orders of Dismissal" (N.Y. Criminal Procedure Law § 290.10 [McKinney 1971]), would necessarily occasion a second trial in the event of a reversal, the statute's provisions are violative of a criminal defendant's right against multiple prosecutions as enunciated in *Jenkins* and *Wilson*.

Concluding that this Court "has left no doubt that whether the trial court's order of dismissal was or was not grounded in factual determinations is immaterial to whether such dismissal may be appealed by the government" (Appendix B, pp. A16-A17), the Court of Appeals determined that ". . . the double jeopardy clause precludes the People from appealing a trial court's order dismissing an indictment where retrial of the defendant, or indeed any supplemental fact-finding, might result from Appellate reversal of the order sought to be appealed" (Appendix B, p. A18). It is respectfully submitted that such a determination constitutes an unduly restrictive interpretation of this court's pronouncements in this area.

Indeed, such a narrow reading of the concept of "former jeopardy," as one possessing talismanic qualities which *ipso facto* determines a double jeopardy claim in favor of the accused, eschews this Court's oft-articulated warning that:

> " 'The conclusion that jeopardy has attached begins, rather than ends the inquiry as to whether the double jeopardy clause bars re-trial' *Illinois* v. *Sommerville*, 410 U.S. 458, 467 (1973)." *Serfass, supra*, at p. 390.

It thus overlooks, and thereby makes short shrift of the explicit acknowledgement in *Serfass* (decided only six days after *Jenkins*—the case upon which the court below predominantly relied) that as to pure questions of law which culminate in dismissals of indictments,

> "We of course express no opinion on the question whether a similar ruling by the District Court after jeopardy attached would have been appealable." 420 U.S. at 394.*

Compare in this regard, *United States* v. *Fayer*, 523 F. 2d 661 (2d Cir. 1975) (government appeal dismissed where in event of reversal, "additional findings of fact would, per-

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* Most noteworthy is the fact that in *Jenkins*, this Court, unlike the Circuit Court of Appeals therein, was unsure as to whether any factual findings had been made in furtherance of the "acquittal" by the Judge at the bench trial. It was accordingly, in this context, that the defendant was given the benefit of any existing doubt, and it was thus decided that "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged would have been required upon reversal and remand." (420 U.S. at 370.) Contradistinctive, however, is the situation in *Serfass*, and in the matter *sub judice*, which involved indictment dismissals predicated solely on questions of law—despite the divergent view expressed by the concurring Judges herein—without any determinations as to the underlying facts of the case.

force, have been demanded''),* with *United States* v. *Kehoe*, 516 F. 2d 78 (5th Cir. 1975), *reh. denied* 521 F. 2d 815, *cert. denied* 96 S. Ct. 1103, *reh. denied* 96 St. Ct. 1687 (dismissal of indictment after jeopardy on purely legal grounds, held not to preclude a new trial in the event of reversal pursuant to prosecutorial appeal). Significantly, the *Kehoe* Court, unlike the Court of Appeals herein, *duly* considered the language in *Serfass* quoted above. In observing that,

> ''[t]he implication that these might be open issues is important because both hypothetical cases [as envisioned in *Serfass*] seem to fall directly within the *Jenkins* rule'' (516 F. 2d at 84),

the Court concluded that,

> ''[c]onsequently, it seems likely that the [Supreme] Court intended *Jenkins* to be limited to its facts: a bench trial terminated by a ruling that—since it may have been one in fact—must be treated as an acquittal for purposes of the double jeopardy clause.''**

Considering all the foregoing, it is the position of the Petitioner that the Court of Appeals herein has pursued an erroneous and overly simplistic approach to this necessarily more complex question. Accordingly, a substantial issue of Federal Constitutional law affecting all prosecutorial agencies of the State of New York has been brought to the fore, and is thereby deserving of this Court's attention.

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* See also, as involving predicate factual determinations in this context, *Fong Foo* v. *United States*, 369 U.S. 141 (1969) and *United States* v. *Sisson*, 339 U.S. 267 (1970). *Cf. Illinois* v. *Somerville*, 410 U.S. 458 (1973); *Gori* v. *United States*, 367 U.S. 364 (1961).

** But see *United States* v. *Means*, 513 F. 2d 1329 (8th Cir. 1975).

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: Brooklyn, New York
June, 1976

Respectfully submitted,

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District Attorney
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MARK M. BAKER
SUZAN PICARIELLO
Assistant District Attorneys
of Counsel

APPENDICES

APPENDIX A

Opinion

STATE OF NEW YORK

Court of Appeals

1

No. 289

The People &c.,

Respondent,

vs.

Edwin Baker,

Appellant.

Harvey L. Greenberg for appellant.

Eugene Gold, District Attorney (Suzan Picariello & Mark M. Baker of counsel) for respondent.

* * * * *

Order reversed and the case remitted to the Appellate Division, Second Department, with directions that the appeal to that court be dismissed (*People* v. *King Brown*, — NY2d —, decided herewith). All concur except Breitel, *Ch. J.*, who concurs in part and dissents in part and votes to reverse and dismiss the indictment in an opinion in which Jasen, *J.*, concurs.

Decided June 17, 1976

Breitel, *Ch. J.* (concurring in part):

There is no need to reach the constitutional question for, on independent grounds, the Trial Court correctly dismissed the indictment against defendant.

The People's only available eyewitness to the shooting, Rufus Boyd, was at the time of Baker's trial under indictment by both State and Federal authorities for four drug-related offenses, including possession of a kilo of heroin. Since Boyd's testimony concerning the events before and after the shooting in fro. . of his place of business necessarily involved his own activities at that time and place, defense cross-examination related to his contemporaneous drug activity was not collateral, contrary to the characterization by the Appellate Division. Hence, when witness Boyd claimed his privilege against self-incrimination, refusing to answer any questions upon cross-examination, the Baker trial court correctly struck his direct testimony and dismissed the indictment.

Although, on this view, it is unnecessary to reach the double jeopardy question, since the court does, further comment is appropriate. In this non-jury trial, unlike *People* v. *King Brown,* — NY2d — decided herewith), the judge arguably weighed the evidence remaining after Boyd's testimony was stricken, expressly conceded at the Baker trial to be insufficient to prove the crime charged against Baker beyond a reasonable doubt, and therefore perforce terminated the trial. Under such circumstances, the Double Jeopardy Clause applies and prohibits retrial (*United States* v. *Jenkins,* 420 US 358; *People* v. *King Brown,* — NY2d —, *supra,* dis. op., slip op. at 3). Thus, on constitutional grounds the result should be the same, but not for the unnecessarily broad reasons stated in *People* v. *King Brown* (— NY2d —, *supra,* decided herewith).

Consequently, there is no need for remittal to the Appellate Division and there should be a straightforward reversal and dismissal of the indictment.

APPENDIX B

Opinion

STATE OF NEW YORK

COURT OF APPEALS

—o—

1 No. 287

THE PEOPLE &C.,

Appellant,

vs.

KING BROWN,

Respondent.

—o—

Robert M. Morgenthau, District Attorney (Peter L. Zimroth & Robert M. Pitler of counsel) for appellant.

Susan E. Hofkin & William E. Hellerstein for respondent.

JONES, *J.:*

We now hold that section 450.20(2) of the Criminal Procedure Law providing that the People may appeal a trial order of dismissal entered pursuant to CPL § 290.10 is unconstitutional as violative of the right not to be placed twice in jeopardy for the same offense (N.Y.S. Constit., Art. I, § 6; U.S. Constit., Amend. V) if "further proceedings of some sort devoted to the resolution of factual issues going to the elements of the offense charged would have been required upon reversal and remand". (*United States* v. *Jenkins,* 420 U.S. 358, 370).

We recently rejected a similar constitutional challenge to the People's statutory right to appeal such an order (*People* v. *Fellman,* 35 N Y 2d 158, *mot to amd rem granted* 35 N Y 2d 853). Subsequent to our decision in *Fellman,* however, the United States Supreme Court decided three

cases which cast grave doubt as to the continuing viability of the *Fellman* decision (*United States* v. *Wilson,* 420 US 332, and *United States* v. *Jenkins,* 420 US 358, decided February 25, 1975, and *Serfass* v. *United States,* 420 US 377, decided less than a week later on March 3, 1975).[1] We reach our decision today under constraint of these decisions, and accordingly overrule our holding to the contrary in *People* v. *Fellman,* 35 NY2d 158, *supra.*

In this case defendant was charged in a one count indictment with having committed the crime of bribery as defined in Penal Law § 200.00 which at the time of indictment provided:

> A person is guilty of bribery when he confers, or offers or agrees to confer, any benefit upon a public servant upon an agreement or understanding that such public servant's * * * judgment, action, decision or exercise of discretion as a public servant will thereby be influenced.

At defendant's trial the People presented proof that, following the arrest of one Angel Rodriguez, defendant appeared at the local precinct station house and offered Rodriguez's arresting officer money in return for the release of Rodriguez. Following dilatory tactics, the arresting officer succeeded in having defendant repeat the bribe offer in the presence of another officer while a tape-recorder recorded the incriminating conversation.

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[1] Both the First Department in the present case (48 AD2d 95) and the Fourth Department in *People* v. *Gesegnet* (47 AD2d 333) have concluded in the light of the recent trilogy, that *Fellman* is no longer controlling and that CPL § 450.20(2) is unconstitutional. The Second Department has reached a contrary conclusion in *People* v. *Brooks* (50 AD2d 319).

At the conclusion of the People's case-in-chief, defendant moved pursuant to CPL § 290.10 [2] for a trial order of dismissal on the ground that a prima facie case of his guilt of bribery had not been made out. Defendant argued that the statute under which he had been indicted included as an element of the crime an "agreement or understanding" shared by the public servant sought to be influenced as well as by the bribe offeror and that the People had failed to establish a prima facie case because of insufficiency of proof as to this element. The prosecutor agreed that no evidence had been introduced to show that the police officer had entered into a corrupt agreement or understanding but argued that the statute did not require such a showing. Under the prosecutor's analysis, the statutory term "agreement or understanding" referred only to the defendant's state of mind and not to the state of mind of both the defendant and the public servant.

There was thus presented to the trial court a pure question of law, namely, what constitutes the crime of bribery? The court concluded that the "phrase [agreement or understanding] embraces an exchange of promises by both persons or a mutual understanding that in return for the benefit or money offered to the public servant—the offeree—that person will take or will not take certain action or would make or not make a certain decision". Since the People had

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[2] CPL § 290.10 provides in pertinent part:

1. At the conclusion of the people's case or at the conclusion of all the evidence, the court may, except as provided in subdivision two, upon motion of the defendant, issue a "trial order of dismissal," dismissing any count of an indictment upon the ground that the trial evidence is not legally sufficient to establish the offense charged therein or any lesser included offense.

2. Despite the lack of legally sufficient trial evidence in support of a count of an indictment as described in subdivision one, issuance of a trial order of dismissal is not authorized and constitutes error when the trial evidence would have been legally sufficient had the court not erroneously excluded admissible evidence offered by the people.

offered no proof of such an agreement or mutual understanding, the court granted defendant's motion and entered a trial order of dismissal.

Pursuant to CPL § 450.20(2)[3] the People took an appeal to the Appellate Division. Less than 10 days before argument of that appeal, the United States Supreme Court handed down its decisions in *United States* v. *Wilson* (420 US 332, *supra*) and in *United States* v. *Jenkins* (420 US 358, *supra*) establishing the principles by which it is to be determined in what circumstances the government may appeal from an adverse ruling in a criminal trial without violating a defendant's right not to be placed twice in jeopardy for the same offense. Relying on those decisions, the Appellate Division unanimously dismissed the appeal by the People on its analysis that, if the People were to prevail on appeal, a new trial would be required and that a second trial would violate defendant's rights under the federal double jeopardy clause.[4] The Court stated its reasons as follows:

> "We read [*Jenkins* and *Wilson*] as holding that only where there has been a jury verdict of guilty, or findings by the trial court in a nonjury trial to support a verdict of guilty, but the trial court in either case then finds in the defendant's favor on a question of law, will appeal be permitted. In such case the Double Jeopardy Clause does not bar an appeal because errors of law may be corrected and the guilty verdict reinstated without another trial." (48 AD2d at 98.)

[3] CPL § 450.20(2) provides that the People may take an appeal as of right to an intermediate appellate court from a trial order of dismissal entered pursuant to CPL § 290.10. For the legislative history underlying this provision see *People* v. *Sabella* (35 NY2d 158, 164-165).

[4] In dictum, four of the five justices at the Appellate Division indicated that, had they reached the merits of the case before them, they would have concluded that the People had made out a *prima facie* case of bribery; under their interpretation of Penal Law § 200.00 there was no requirement that the People prove that the police officer to whom the bribe was offered agreed or understood that his decision or exercise of discretion would thereby be influenced.

Because our jurisdiction on this appeal extends only to the correctness of the dismissal of the appeal at the Appellate Division (CPL § 470.60[3]) and because of our disposition of this appeal, we express no view as to the correctness of the trial court's interpretation of Penal Law § 200.00 on which the trial order of dismissal was predicated.

On the present appeal, the People argue that the Appellate Division incorrectly distilled from the *Jenkins* and *Wilson* decisions that the only relevant consideration in determining whether the government may appeal from an unfavorable criminal trial ruling is whether, if such appeal should prove successful, the defendant would be required to stand retrial. The People urge that whether a new trial will be required should be viewed as only one of two factors to be considered; of equal importance, it is urged, is whether the trial court's order was an "acquittal" or otherwise based on factual findings "favorable" to the defendant. While there is much in logic to support such an analysis (cf *People* v. *Sabella*, 35 NY2d 158, *supra*; Government Appeals of "Dismissals" in Criminal Cases, 87 HARV. L. REV. 1822, 1837-1841; Twice in Jeopardy, 75 Yale L. Jnl. 262), we conclude that the Supreme Court by its recent trilogy of double jeopardy cases has expressly rejected any such analysis and has interpreted the federal double jeopardy clause exactly as did the court below. As that clause, found in the federal constitution, is binding on the states (*Benton* v. *Maryland*, 395 US 784), we accordingly are constrained to conclude that the order at the Appellate Division dismissing the appeal to that Court must now be affirmed.

Analysis of the limits imposed by the double jeopardy clause on the availability to the prosecution of appeals from trial orders of dismissal necessarily turns on ascertaining the purpose which that clause may be said to effectuate. "Since the prohibition in the Constitution against double jeopardy is derived from history, its significance and scope must be determined, 'not simply by taking the words and a dictionary, but by considering [its] . . . origin and the line of [its] . . . growth'." (*Green* v. *United States,* 355 US 184, 199 [Frankfurter, *J.,* dissenting].) It thus serves to recognize that the prohibition against being placed twice in jeopardy actually encompasses three prohibitions: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." (*North Carolina* v. *Pearce,* 395 US 711, 717 [fns. omitted].) Each "protection" serves different purposes and is surrounded by its own exceptions thereby complicating exposition of which rule attaches in different procedural situations. (For a critical analysis that "the judiciary is content to apply the double jeopardy prohibition with only a reverent nod to its policies" and without scrutiny of these policies, see Twice in Jeopardy, 75 Yale L. Jnl. 262, *supra.*)

In the present case we are concerned with that function of double jeopardy which protects against retrial for the same offense following a previous acquittal thereon. In *United States* v. *Green,* 355 US 184, 187, *supra,* the Supreme Court analyzed the purposes and policies underlying this aspect of double jeopardy:

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

(See also *United States* v. *Jorn,* 400 US 470, 479.) Thus the Supreme Court has identified two policies which underlie the prohibition against retrial following acquittal—prevention of harassment of criminal defendants and prevention of unjust convictions by subjection of defendants to repeated criminal trials until a factfinder may be found who will agree to convict. While both policies are equally expressive of the maxim at common law, *nemo debit bis vexari pro una et eadem causa* (no one should be twice vexed for one and the same cause), it readily appears that, depending on which policy is considered paramount, the question as to whether the double jeopardy clause permits to the government an appeal from a trial order of a dismissal will result in different and even opposite answers. Thus if the policy underlying that clause is to prevent a defendant from suffering the "embarrassment, expense and ordeal" of a retrial should the government prevail on its appeal from a trial order of dismissal, then the answer can only be that such appeal is barred by the double jeopardy clause. If on the other hand the predominant purpose is to prevent unjust convictions secured after repetitive trials before successive triers of facts, then an appeal by the government from a trial order dismissing an indictment on a pure question of law (as in the present case) should not be barred by the double jeopardy clause. In the latter case,

the question of a defendant's guilt would have been withdrawn from the trier of fact on the basis of a determination of law by the trial court and should such legal ruling be reversed on appeal and defendant required to stand retrial, there would be no enhanced probability of an unjust conviction secured through repeated prosecutions there having been no prior determination of factual innocence.

In the present case, the People argue that we should find as the controlling policy here to be applied the second policy or the prevention of unjust convictions. Such a contention is not without logic as support. The Supreme Court has recognized in the context of premature termination of trials by declaration of mistrial that "the defendant's interest in proceeding to verdict [and thereby precluding a second trial] is outweighed by the competing and equally legitimate demand for public justice". (*Illinois* v. *Somerville*, 410 US 458, 471.) The "embarrassment, expense and ordeal" to a defendant whose first trial ended in a hung jury and who is forced to undergo retrial may be said to be equally as substantial as the harassment suffered by a defendant who, as in the present case, has yet to present any proof of his innocence. It is also argued that adoption of a rule permitting prosecution appeals only where no possibility could result therefrom that defendant would be required to undergo the ordeal of retrial appears to run counter to the Supreme Court's admonition that "we have disparaged 'rigid, mechanical' rules in the interpretation of the Double Jeopardy Clause. *Illinois* v. *Somerville*, 410 US 458, 467." (*Serfass* v. *Wilson*, 420 US 377, *supra;* see also *United States* v. *Jorn*, 400 US 470, 480, *supra* [a "mechanical rule prohibiting retrial whenever circumstances compel the discharge of a jury without the defendant's consent would be too high a price to pay for

the added assurance of personal security and freedom from governmental harassment which such a mechanical rule would provide"].) Thus, while we recognize that permitting the People to appeal trial orders dismissing an indictment on a pure question of law could be determined not to be in contravention of a policy protecting against the securing of unjust convictions and that the corollary policy of protecting against harassment of defendants could be found to be "outweighed by the competing and equally legitimate demand for public justice" (such analysis was fundamental to our holding in *People* v. *Fellman*, 35 NY2d 158, *supra*), we conclude that the recent Supreme Court trilogy of double jeopardy cases mandates a contrary holding. We turn then to an analysis of these cases.

In *United States* v. *Wilson*, 420 US 333, the defendant was tried for converting union funds to his own use, the jury entered a verdict of guilty, but on a post-verdict motion the trial court dismissed the indictment on the ground that defendant had been prejudiced by delay between offense and indictment. The government took an appeal to the Court of Appeals pursuant to U.S.C. title 18, § 3731,[5] but that Court held that the double jeopardy clause barred review of the trial court's ruling. In so holding, the Court of Appeals "reasoned that since the District Court had relied on facts brought out at trial in finding prejudice from the pre-indictment delay, its ruling was in effect, an acquittal." (420 US at 335.) On appeal to the Supreme Court

[5] That section provides in relevant part:

"In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

the Government argued that "the constitutional restriction on governmental appeals is *intended solely to protect against exposing the defendant to multiple trials,* not to shield every determination favorable to the defendant from appellate review. Since a new trial would not be necessary where the trier of fact has returned a verdict of guilty, the Government [argued] that it should be permitted to appeal from any adverse post-verdict ruling." (*Ibid.;* emphasis supplied.) In reversing the order of dismissal at the Court of Appeals, the Supreme Court adopted the Government's arguments and held "that the constitutional protection against Government appeals attaches only where there is a danger of subjecting the defendant to a second trial for the same offense . . ." (420 US at 336.) The Court's holding was supported entirely by its analysis of the policies underlying the double jeopardy clause (420 US at 339-342; for further analysis of such policies see Twice in Jeopardy, 75 Yale L Jnl 262, *supra*). On the basis of such analysis, the Court focused "on the prohibition against multiple trials as the *controlling* constitutional principle" (420 US at 346; emphasis supplied). Thus the Court concluded that "where there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended" and that, in the case before it "[s]ince reversal on appeal would merely reinstate the jury's verdict, review of such an order does not offend the policy against multiple prosecution." (420 US at 344-345.)

While Wilson involved the constitutionality of prosecution appeals from trial court orders dismissing indictments following a verdict of guilty (and thus is instructive to the present case only in the analysis there engaged in by the Court), in *United States* v. *Jenkins* (420 US 358, *supra*) the Court was confronted with a government appeal from a

trial order which dismissed the indictment following a bench trial but prior to the trial court's finding of facts on all elements of the crime charged. Thus the procedural posture of the appeal scrutinized in *Jenkins* may be said to be comparable to that here under review. In *Jenkins* the prosecution argued that, while appellate reversal of the trial court's order dismissing the indictment would require defendant to stand retrial, such retrial would not be in violation of double jeopardy principles since the trial order of dismissal was not grounded in factual determinations favorable to the defendant. The Court rejected that argument and held that the appeal was barred by the double jeopardy clause:

> "Here there was a judgment discharging the defendant, although we cannot say with assurance whether it was, or was not, a resolution of the factual issues against the Government. *But it is enough for purposes of the Double Jeopardy Clause,* and therefore for the determination of appealability under 18 U.S.C. § 3731, *that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand.* Even if the District Court were to receive no additional evidence, it would still be necessary for it to make supplemental findings. *The trial, which could have resulted in a judgment of conviction, has long since terminated in respondent's favor.* To subject him to any further proceedings at this stage would violate the Double Jeopardy Clause: 'The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an

> alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity. . . .' *Green* v. *United States, supra,* at 187." (420 US at 369-379; emphasis supplied.)[6]

It may be asserted, and accurately, that in *Jenkins* the Supreme Court was confronted with a judgment discharging the defendant as to which it could not be said "with assurance whether it was, or was not, a resolution of the factual issues against the Government". (420 US at 369-370.) It was open to the Court in such circumstance to fashion a different rationale for the decision it made. The Court could easily have held that where the dismissal was not on the law, i.e., where it was clearly on the facts or where it could not accurately be determined whether it was on the facts or the law, double jeopardy would preclude appeal. Consistently the Court could then have held that when the dismissal was clearly on the law alone there would be no double jeopardy bar. (Cf. *People* v. *Sabella,* 35 NY2d 158, *supra.*) But most significantly this rationale was not chosen as the basis of the Court's decision; on the contrary the touchstone was explicitly described as whether "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand" (420 US at 370).

In the third of the trilogy of cases, *Serfass* v. *United States* (420 US 377), the Court was confronted with an

[6] We consider it to be at least of some significance that in its quotation from *Green* as to the policy underlying the double jeopardy clause, the Court chose to include only the reference to preventing harassment of criminal defendants and excised the reference to prevention of unjust convictions (for full quotation of language in *Green* see p. 5, *supra*).

appeal from a pretrial order dismissing an indictment based on a legal ruling made by the trial court after its examination of records and an affidavit setting forth evidence to be adduced at trial. Conceding that "formal or technical jeopardy had not attached" at the time when the order dismissing the indictment had been entered, the defendant nevertheless argued in the Supreme Court that, because the pretrial ruling was based on evidentiary facts outside of the indictment, which facts would constitute a defense on the merits at trial, the ruling was the functional equivalent of an acquittal on the merits and accordingly that the policies of the double jeopardy clause would in fact be frustrated by further prosecution (420 US at 389-390). The Supreme Court rejected that argument and in so doing stressed the importance of "the procedural context" in which the order dismissing the indictment was entered (420 US at 392). Thus the Court concluded that even if the order of dismissal might be characterized as an acquittal in a generic sense, such order "has no significance in this context unless jeopardy has once attached . . . ." (*Ibid.*)

On the basis of these three cases we conclude that the Supreme Court has formulated a double jeopardy rule—albeit what may be characterized as a mechanical rule—which precludes the People from taking an appeal from an adverse trial ruling whenever such appeal if resolved favorably for the People might require the defendant to stand retrial—or even if it would then be necessary for the trial court "to make supplemental findings" (*United States* v. *Jenkins,* 420 US at 370, *supra*). Double jeopardy principles will bar appeal unless there is available a determination of guilt which without more may be reinstated in the event of a reversal and remand. Application of such rule to the provisions of CPL § 450.20(2) permitting the People to appeal

from a trial order of dismissal renders that section unconstitutional except in the instance where disposition of the motion is reserved until after the jury verdict has been returned.

The People argue that the purpose of the double jeopardy clause is to preserve for the defendant "acquittals" or "favorable" factual determinations but not to shield from appellate review erroneous legal conclusions not predicated on any factual determinations. Thus the People contend that double jeopardy plays no role in the present case where all factual conclusions were made favorably to the People and where dismissal was predicated solely on an erroneous conclusion by the trial court as to an issue of law.

In the light of the Supreme Court trilogy of cases, the People's argument must fail. At the outset the argument ignores what the Court termed the "controlling constitutional principle" in the context of application of double jeopardy principles to appeals by the government—"prohibition against multiple trials". (*Wilson*, 420 US at 345-346, *supra*.) In *Jenkins* the Court left no doubt that the touchstone in the resolution of whether such appeals may be permitted is whether retrial—or even supplemental fact findings—would be necessitated by a successful government appeal. The People's argument that whether retrial might follow a successful government appeal should be viewed as only one of two equally important factors is identical to the argument propounded by the government in *Jenkins* (see 420 US at 368) and was expressly rejected by that court (420 US at 369).

More significant, the Supreme Court has left no doubt that whether the trial court's order of dismissal was or was not grounded in factual determinations is immaterial

to whether such dismissal may be appealed by the government. In *Wilson* the order sought to be appealed was predicated entirely on factual determinations which were adduced from evidence presented at trial. An appeal by the government was nonetheless permitted. In *Jenkins* the Court could not have been more explicit in making it clear that the legal-factual dichotomy plays no role and that the concern of the double jeopardy clause extends no further than to the question whether retrial might follow a successful prosecution appeal (420 U.S. at 370). It is instructive to note that when *Jenkins* was decided in the Court of Appeals, Judge Lumbard wrote a dissenting opinion grounded very much in the legal-factual dichotomy propounded herein by the People (490 F.2d 868, 880-885). In its opinion the Supreme Court expressly rejected the analysis proposed by Judge Lumbard (420 US at 365, fn 7).[7]

The People further propose that the issue herein presented may be analogized to the issue presented by the case which, on a jury's inability to reach a verdict, terminates prematurely in a declaration of mistrial and as to which the double jeopardy clause poses no bar to retrial (*United States* v. *Perez*, 22 US [9 Wheat] 579). (It was on the basis of exactly this analogy that the Appellate Division, Second Department, concluded in *People* v. *Brooks*, 50 A.D.2d 319, *supra*, that the *Wilson*, *Jenkins* and *Serfass* decisions do not require departure from our holding in *People* v. *Sabella*,

[7] We cannot read Mr. Chief Justice Berger's language in his opinion in *Serfass* which focused the Court's holding in that case on the critical circumstance that jeopardy had not there attached—"we of course express no opinion on the question as to whether a similar ruling by the District Court after jeopardy had attached would have been appealable" (420 US at 394)—as designed significantly to cut back, or to signal a cut-back, in the decision in *Jenkins*, handed down but six days previously.

35 N.Y.2d 158, *supra.*) In the *Jenkins* decision, however, the Court expressly rejected this analysis, finding it "of critical importance" that in the hung jury line of cases the trial ended in a mistrial (not a determination "favorable" to any party) whereas in the present type of case trial terminates in an order dismissing the charges at issue (clearly a determination "favorable" to defendant). (420 US at 365, fn 7.)

We note in passing that in the present case had there been no application for a trial order of dismissal or had the trial court chosen not to exercise his discretion in terminating the trial on the basis of his legal conclusion as to what elements constitute the crime of bribery, this case would undoubtedly have proceeded to the jury under a charge which would have included the trial court's interpretation of the bribery statute. In that event, since the People concededly had offered no proof on what the trial court would have then charged was a third element of the crime of bribery, the jury almost to a certainty would have acquitted this defendant, and it cannot be doubted that no appeal by the People would have lain from such acquittal (*Kepner* v. *United States,* 195 US 100, 130; *United States* v. *Ball,* 163 US 662, 671).

In sum we conclude that the issue presented in this case is directly controlled by the analysis articulated by the Supreme Court in the *Wilson, Jenkins* and *Serfass* decisions and, in particular, by the *ratio decidendi* in *Jenkins.* The inescapable rule which the Supreme Court has fashioned in these cases is that the double jeopardy clause precludes the People from appealing a trial court's order dismissing an indictment where retrial of the defendant, or indeed any supplemental fact-finding, might result from appellate reversal of the order sought to be appealed. It

necessarily follows that in such instances CPL § 450.20(2) cannot stand since it permits exactly that appeal which the Supreme Court has declared the double jeopardy clause will not tolerate.

It is worth adding that to characterize a rule of law as "mechanical" is not always to denigrate the rule. Any rule the application of which forsecloses considerations of fairness and equity peculiar to the individual case must be regarded with particular attention and care. On the other hand there is great merit to a proper categorical rule which is easy of application and susceptible of reliable prediction. So it is with the double jeopardy rule formulated by the Supreme Court. Nor may this rule be expected to frustrate the "public's interest in fair trials designed to end in just judgments" (*Wade* v. *Hunter,* 336 US 684, 689). While some difficulties may be encountered in cases now in the appellate process, the Appellate Divisions in two Departments have previously adopted what we, too, conclude is the rule of the Supreme Court. As to cases in the future, no great problems should be anticipated. In exercising his responsible discretion in deciding whether to grant a motion for a trial order of dismissal, the trial judge must now be aware that the consequence of granting such a motion prior to the return of the jury verdict will be to foreclose appeal by the prosecution. This is not to say that the granting of such a motion prior to verdict may not be fully warranted; it is to say that our decision introduces another consideration to be weighed in the disposition of an application for a trial order of dismissal.

For the reasons stated, the order of the Appellate Division should be affirmed.

BREITEL, *Ch. J.* (dissenting):

I dissent and vote to reverse and reinstate the appeal in the Appellate Division and remit to that court for further proceedings.

The Appellate Division misconstrued and therefore misapplied the holdings in *United States* v. *Jenkins* (420 US 358) and in *United States* v. *Wilson* (420 US 332). Those holdings stand for the proposition that whenever a criminal charge has been dismissed, in whatever way, after a fact-finding consideration of any of the elements of fact involved in the charge, there may not be a new trial on that charge. It makes no difference, after jeopardy has attached, at what stage in the trial, jury or non-jury, the consideration of the factual element occurred whic resulted in the dismissal of the charge. Moreover, it is enough that the appellate court cannot say with assurance whether there was a resolution of any of the factual issues against the prosecution. A reading of *United States* v. *Jenkins* (*supra*), at pp. 368-370) supports the above analysis. It does not extend to the situation where it is clear beyond doubt that no factual issue has been resolved in favor of defendant on the trial. In such case the suggestion in *Serfass* v. *United States* (420 US 377, 394) is applicable, namely, that a trial interrupted by defendant's motion to dismiss on a pure question of law and the erroneous granting of such motion does not necessarily bar a retrial. Notably, the *Serfass* case was decided a week later than the *Jenkins* case.

There is no dispute concerning what occurred at the trial in this case. Notably, this was a jury trial and not a non-jury trial as was involved in the *Jenkins* case. The People gave proof that defendant King Brown offered money to police to obtain the release from arrest of one Angel Rodriguez. Rodriguez had been arrested for possession of a stolen automobile. Immediately after the presentation of the People's case the trial court dismissed the indictment, on defendant's motion, on the ground that the People had failed to submit proof of an element of the crime of bribery. The trial court held that there was no proof whether any public officer had agreed or understood that his decision or exercise of discretion would be influenced by the offer of money. The People appealed.

Although a majority of the Appellate Division concluded that the trial court was in error as a matter of law in so holding, it nevertheless dismissed the appeal. It did so because the Appellate Division correctly observed that the crime of bribery did not require any agreement or understanding to accept a bribe for the purpose for which it had been offered.

The Appellate Division believed it was constrained, however, by the holdings in the *Jenkins* and *Wilson* cases (*supra*), on the view that double jeopardy had attached and that therefore a retrial of defendant would be barred. They indicated this view by their concurrence in part with the opinion of Mr. Justice Nunez who read the *Jenkins* and *Wilson* cases to require that a retrial, as well as an appeal, is prohibited unless there has been a finding by jury or bench at the trial level in favor of guilty by the defendant. Of course, if there had been a verdict of guilt, but set aside erroneously as a matter of law, correction of the error at the appellate level would not require a retrial, because the verdict or judgment could be reinstated (*United States* v. *Wilson*, 420 US 332, 352-353, *supra*). So Mr. Justice Nunez stated in his opinion: "since there has not been a verdict of guilty or a finding of facts sufficient to support the defendant's guilt, a successful appeal by the People would result in a second trial in violation of the operative prniciples of the Double Jeopardy Clause."

In so concluding, the Appellate Division has misapplied the cited cases. To recapitulate, the United States Supreme Court has held that where a judge, in terminating a non-jury trial, possibly made a finding of fact favorable to the defendant, no further proceeding was constitutionally permissible. For double jeopardy purposes, a termination of trial where it is unclear whether the basis was entirely or in some measure based upon a finding of fact, there is an acquittal as a matter of constitutional law, however the acquittal may be denominated.

In this case, however, there was not the slightest suggestion by the trial court that any of the People's proof was wanting in weight or credibility but instead the indictment was dismissed before anything had been submitted or considered by the fact-finders solely on a pure question of law. Since the jury never received the issues of fact there was never any possibility that a determination by the jury in favor of defendant had been made by them. Had the trial court in dismissing the indictment as a matter of law weighed any one or more of the elements of fact in the case, then the Double Jeopardy Clause applied and a retrial would be prohibited. Hence, the rule in the *Jenkins* case is inapplicable, because neither judge nor jury had passed on any issue of fact.

It is not true that in any case where a jury has been empaneled or proof has been taken which does not result in a finding of guilt that there is automatic double jeopardy. As the Court held in *Illinois* v. *Somerville* (410 US 458, 467) and reaffirmed in *Serfass* v. *United States* (420 US 377, 390, *supra*): "the conclusion that jeopardy has attached begins, rather than ends, then inquiry as to whether the Double Jeopardy Clause bars retrial." If the termination of the trial is due to some "manifest necessity", such as the death of the judge, or because the termination is

made on application of the defendant addressed to a pure question of law, there is no double jeopardy, although jeopardy attached at the beginning of the trial (see *Illinois* v. *Somerville, supra,* at p. 468). In the case where the termination is by defendant's motion or at his instance the termination is his "fault" (see *United States* v. *Kehoe,* 516 F2d 78, 86; cf., *United States* v. *Tateo,* 377 US 463, 467). If, on the other hand, the termination is due to the "fault" of the prosecution, a retrial is prohibited under historical and current double jeopardy principles.

Accordingly, I dissent and vote to reverse and reinstate the appeal of the People in the Appellate Division and to remit the proceedings to that court.

* * * * *

Order affirmed. Opinion by Jones, *J.* All concur except Breitel, *Ch.J.*, who dissents and votes to reverse in an opinion in which Jasen, *J.*, concurs.

Decided June 17, 1976

APPENDIX C

Memorandum

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—SECOND DEPARTMENT

———o———

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

vs.

EDWIN BAKER a/k/a B. EDWIN BAKER,

Respondent.

———o———

Appeal by the People from a trial order of dismissal of the Supreme Court, Kings County, entered November 14, 1974. Trial order of dismissal reversed, on the law, and indictment reinstated. Defendant was indicted for the crimes of murder and possession of weapons and dangerous instruments, as a felony, arising out of the fatal shooting of one James B. Anderson on April 3, 1971. Two witnesses to the shooting testified before the Grand Jury, but one of them could not be located at the time of defendant's trial. The other witness had three State indictments and one Federal indictment for the sale and possession of drugs pending against him at the time of defendant's trial. The People, apparently anticipating that the witness would assert his privilege against self incrimination if questioned concerning the facts underlying those indictments, moved for a protective order restricting the scope of cross-examination with reference to them. Defense counsel objected, contending that such an order would prevent him from impeaching

the witness' credibility and would deny defendant his constitutional right to confront the witness by unreasonably foreclosing effective cross-examination. The trial court indicated that it would not grant the People's motion for a protective order and that it would strike the witness' direct testimony if he asserted his privilege against self incrimination when questioned concerning the facts underlying the indictments against him. During the nonjury trial the witness inculpated defendant in his direct testimony. On cross-examination the following transpired: "Q. Mr. Boyd, is it not a fact that on or about April 30, 1971, in the County of Kings, at 529 Montgomery Street, you were in possession of sixteen ounces of heroin? * * * A. I refuse to answer on the grounds that it might incriminate me." At this point, the witness' counsel advised the court that his client would continue to invoke his Fifth Amendment privilege concerning any cases presently pending against him in the absence of a grant of immunity to him by the District Attorney. The District Attorney indicated that he would not grant immunity to the witness. Defense counsel argued that he could not effectively cross-examine the witness under the circumstances and moved to strike the witness' direct testimony. The trial court granted the motion. The People then indicated that it had no further witnesses to call. Defendant thereupon moved for a trial order of dismissal. When the People conceded that, absent the witness' direct testimony, the remaining circumstantial evidence was insufficient to prove defendant's guilt beyond a reasonable doubt, the trial court granted defendant's motion and dismissed the indictment. In our view the trial court erred in granting defendant's motion for a trial order of dismissal. Since it is conceded that the witness was justified in asserting his Fifth Amendment privilege, the only issue remaining is whether defendant was thereby deprived of his constitu-

tional right to confront the witness through effective cross-examination. In this regard it has been held that where "the [Fifth Amendment] privilege has been invoked as to purely collateral matters, there is little danger of prejudice to the defendant and, therefore, the witness's testimony may be used against him. * * * On the other hand, if the witness by invoking the privilege precludes inquiry into the details of his direct testimony, there may be a substantial danger of prejudice because the defense is deprived of the right to test the truth of his direct testimony and, therefore, that witness's testimony should be stricken in whole or in part" (*United States* v. *Cardillo,* 316 F2d 606, 611, cert den 375 US 822). In this case, the attempted cross-examination of the witness was intended to impeach his credibility by showing his past misconduct. That line of inquiry was initiated by defense counsel; the Fifth Amendment privilege was invoked by the witness as to collateral matters, in that the inquiry was not concerned with the details of his direct testimony. Accordingly, it was error for the trial court to have stricken the witness' direct testimony and to have dismissed the indictment (see *United States* v. *Cardillo, supra; Fountain* v. *United States,* 384 F2d 624, cert den 390 US 1005; *United States* v. *Norman,* 402 F2d 73 cert den 397 US 938). Finally, in our view the case at bar is distinguishable from the recent decision of the Court of Appeals in *People* v. *Schneider* (36 NY2d 708 [revg 44 AD2d 845 on the dissenting memorandum of Mr. Justice Hopkins]). In *Schneider,* the defendant was deprived of his fundamental right to confront the witnesses against him when one of the prosecution's witnesses testified on direct examination to substantial matters against the defendant and then asserted his privilege against self incrimination when cross-examined as to those matters. Rabin, *Acting P.J.,* Hospkins, Martuscello, Christ and Brennan, *JJ.,* concur.